

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent,

v.

LUIS MENDOZA-MORALES,

Petitioner.

NO. CR-02-0208-EFS
[NO. CV-05-0268-EFS]

**ORDER DENYING
PETITIONER'S MOTION UNDER
28 U.S.C. § 2255 TO
VACATE SENTENCE AND
CLOSING CIVIL FILE**

BEFORE THE COURT is Petitioner Luis Mendoza-Morales' Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 43) and Ineffective Assistance of Counsel Declaration (Ct. Rec. 47). Upon receipt of a 28 U.S.C. § 2255 habeas petition, the district court is required to review the motion, files, and records, to determine whether they "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 ¶ 2. After the initial review, the Court dismissed Mr. Mendoza Morales' *Booker*-related claim¹ and requested Mr. Mendoza-Morales supplement his ineffective assistance

¹ The Court dismissed Mr. Mendoza Morales' *Booker*-related claim challenging the constitutionality of his sentence, which was imposed under the "mandatory" U.S. Sentencing Guidelines, given that *United States v. Booker*, 125 S. Ct. 738 (2005), was decided following Mr. Mendoza Morales' direct appeal.

1 of counsel claim; Mr. Mendoza-Morales did so on October 24, 2005. After
2 reviewing the declaration submitted, the Court conclusively determines
3 Mr. Mendoza-Morales is not entitled to relief under his ineffective
4 assistance of counsel claim. Accordingly, the Court denies his petition.

5 The right to effective assistance of counsel in criminal proceedings
6 is bestowed by the Sixth Amendment. This right is violated when defense
7 counsel's performance falls below an objective standard of reasonableness
8 and the criminal defendant is prejudiced by such deficiency. *Strickland*
9 *v. Washington*, 466 U.S. 668, 687 (1984). Counsel's decisions are
10 "examined according to what was known and reasonable at the time the
11 attorney made his choices." *Hendricks v. Caleron*, 70 F.3d 1032, 1036
12 (9th Cir. 1995). A court must defer to defense counsel's decision if it
13 was within the range of reasonable professional assistance. *Lang v.*
14 *Callahan*, 788 F.2d 1416 (9th Cir. 1986); *United States v. Ferreira-*
15 *Alameda*, 804 F.2d 543, 546 (9th Cir. 1986). A criminal defendant is
16 prejudiced if there was a "reasonable probability that, but for counsel's
17 unprofessional errors, the result of the proceeding would have been
18 different." *Strickland*, 466 U.S. at 694.

19 Mr. Mendoza-Morales claims counsel Amy Schwering failed to mention
20 the word "enhancement"² and inform him of a "3 year term," prior to entry
21 of his guilty plea. However, Mr. Mendoza-Morales does state that Ms.
22 Schwering mentioned, if Defendant went to trial, he could be looking at
23 twenty years. At sentencing, Amy Rubin represented Mr. Mendoza-Morales.
24 He states, even at sentencing, he was not told that the enhancement would

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26 ² The Court presumes Mr. Mendoza-Morales' reference to
"enhancements" pertains to U.S. Sentencing Guidelines enhancements.

1 double his sentence and claims that he learned of the enhancement on or
2 about August 5, 2005, when reviewing discovery.

3 Mr. Mendoza-Morales entered into a Plea Agreement (Ct. Rec. 23) with
4 the Government, which was accepted by the Court, on August 19, 2003.
5 This Plea Agreement advised Mr. Mendoza-Morales of the maximum penalties
6 under the statute, including a twenty-year term of imprisonment and a
7 three-year term of supervised release. The Plea Agreement did not
8 specify an anticipated U.S. Sentencing Guideline range, but rather noted
9 "[a]t the time of sentencing, the United States agrees to recommend that
10 the Court impose a sentence at the low end of the applicable sentencing
11 guideline range to be followed by a three (3)-year term of supervised
12 release." (Ct. Rec. ¶ 7.) Thus, the Plea Agreement does not set out a
13 specific sentencing guideline calculation; and the Court assumes for
14 purposes of this Order that Ms. Schwering did not discuss the potential
15 sentencing guideline calculations with the Defendant and, more
16 specifically, did not discuss any potential U.S. Sentencing Guideline
17 "enhancements." Nevertheless, the Court concludes Mr. Mendoza Morales
18 cannot establish ineffective assistance of counsel. The Ninth Circuit
19 has stated defense counsel's inaccurate prediction of a sentence does not
20 constitute ineffective assistance of counsel. *United States v. Turner*,
21 881 F.2d 684, 687 (9th Cir. 1989), *overruled on other grounds by United*
22 *States v. Rodriguez-Razo*, 962 F.3d 1418 (9th Cir. 1992). Based on the
23 Ninth Circuit's reasoning in *Turner*, the Court finds counsel's failure
24 to discuss applicable sentencing enhancements prior to entry of a guilty
25 plea does not constitute ineffective assistance of counsel, as long as
26 the defendant is advised of the maximum sentence. Mr. Mendoza Morales
concedes Ms. Schwering informed him of a twenty-year statutory maximum.

1 Moreover, even if counsel's performance was deficient, Mr. Mendoza
2 Morales cannot establish prejudice, given that the seventy-seven month
3 sentence he received is significantly less than the twenty-year maximum
4 sentence he was warned of. See *id.*; *Knight v. United States*, 37 F.3d
5 769, 775 (1st Cir. 1994). Similarly, the Court finds Mr. Mendoza Morales
6 cannot establish prejudice as a result of any failure of Ms. Rubin to
7 discuss sentencing enhancements.³ Accordingly, **IT IS HEREBY ORDERED:**
8 Mr. Mendoza-Morales' Petition Under 28 U.S.C. § 2255 to Vacate, Set
9 Aside, or Correct Sentence by a Person in Federal Custody (**Ct. Rec. 43**)
10 is **DENIED**. All other pending motions are **DENIED AS MOOT**. The related
11 civil file shall be **CLOSED**.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter
13 this Order and provide a copy of this Order to Defendant/Petitioner at
14 the following address:

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20 ³ The Presentence Investigation Report included a sixteen-level
21 enhancement under U.S. Sentencing Guideline § 2L1.2(b)(1)(A)(I) because
22 of Defendant's prior conviction for drug trafficking offense with a
23 sentence exceeding thirteen months. The Court determined the sentencing
24 enhancement was appropriate and imposed a sentence at the low-end of the
25 applicable guideline range. (Ct. Recs. 32 & 33.) Accordingly, the
26 enhancement was discussed in the report and at the sentencing hearing.

1 Luis Mendoza-Morales
2 Reg. No. 10699-085
3 Benton County Corrections
4 Building B, Pod 303-1
5 7122 W. Okanogan Place
6 Kennewick, WA 99336

7 **DATED** this 3rd day of November, 2005.

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9 S/ Edward F. Shea
10 EDWARD F. SHEA
11 United States District Judge
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